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thereof. Such a conviction has been supported.[18] It can hardly be said as a matter of law that an act was done in pursuance of the common intent, if the parties have agreed that such act shall not be done. It might well be that such would be a proper question for a jury to consider and determine whether the expressed intent was in fact the real intent of the parties. At least to secure a conviction of murder in the first degree where premeditation and deliberation to kill must be affirmatively proved by the Commonwealth, it would seem to be error to hold as a matter of law that a party to a conspiracy was liable in that degree for a crime against which he has remonstrated.

Liability for Injury by Contact With Live Wire.

Negligence has often been defined as the absence of due care under the circumstances.[1] And it is quite well-established that he who alleges negligence on the part of another must show that there was from that other a duty owing him, the breach of which duty constitutes the negligence alleged.[2] Therefore, where there is no duty owing, there can be no negligence. It is on this ground that the occupiers of real property, although careless in the use of that which is on their land, are excused for injuries caused to trespassers as the result of such carelessness.[3]

In the case of infant trespassers, many jurisdictions make some exceptions, as in what are known as the "turntable cases," where infants, although trespassers, have been allowed to recover damages for injuries sustained while meddling with dangerous machinery on the land of the defendants, the courts holding that the latter were bound to guard against such trespassers.[4]

A slightly different question often arises where the injury occurs through the carelessness of the defendant, but not on his property. Such was the situation in *Mullen* v. *Wilkes-*

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[18] *People* v. *Vasquez*, 49 Cal. 560.

[1] *Turnpike Co.* v. *Railroad Co.*, 54 Pa. 345.

[2] *Heaven* v. *Pender*, 11 Q. B. D. 503.

[3] *Brady* v. *Prettyman*, 193 Pa. 628.

[4] *R. R.* v. *Stout*, 17 Wall. (U. S.) 57.

Barre Gas and Electric Company, 38 Pa. Superior Ct. 3 (Advance Reports), decided February 26, 1909. The plaintiff, a boy of tender years, while at play climbed a chestnut tree standing upon a sidewalk of a street, and was injured by coming in contact with a defectively insulated electric wire of the defendant company. It appeared that the tree stood on premises not belonging to the company, and that it had no property right of any kind in the tree or the premises on which it stood. It was further shown that the defective insulation of the wire in the branches of the tree had continued for a period of from four to six months before the accident; that during this period sparks had been emitted by the contact of wire and branches; and that in pleasant weather the children of the neighborhood were accustomed to assemble about the tree to play, and to climb into it. The defendant conceded its obligation to keep its wires safe as to those lawfully using the streets in the ordinary way, as well as to those who, in the exercise of some right, might be required to approach them, but contended that no such obligation existed as to children of immature age who voluntarily placed themselves in dangerous proximity to its wires stretched twenty feet above the ground.

The Court, speaking by Judge Head, held that the company's position could not be sustained. Said the Court: "The tree was the private property of the owner of the premises on which it grew and the children seem to have enjoyed, at least the permissive right from that owner, to play in its branches and gather the nuts they bore. The plaintiff, therefore, in climbing the tree was in no sense committing any trespass or infringement upon any right of the defendant; nor did his act need the aid of any invitation, permission or license from the latter to keep it in the category of wholly innocent acts."

It will be seen that the Court based its decision on the ground that the plaintiff was not a trespasser, either as against the defendant or as against the owner of the tree in whose branches its wires were stretched. But even had the Court regarded the plaintiff as a trespasser against the owner of the tree, the result reached would in all probability have been the same, under the authority of a well-known case[5] decided by the Supreme Court of Pennsylvania but a few years ago. There the Court was of opinion that even if the plaintiff, a boy ten years of age, were to be treated as a trespasser as against the owner of the premises on which was located the wire which had caused the plaintiff's injury, this fact could not be set up by

[5] *Daltry* v. *Media Light Co.,* 208 Pa. 403.

the company, which was itself a trespasser as against such owner. It would seem, however, that even had the Court regarded the defendant company as rightfully on the premises and the plaintiff a trespasser, it would have, nevertheless, held the defendant liable. "It must be presumed," said Chief Justice Mitchell, "that the company knew what the evidence disclosed as a fact, that children used the lawn of the premises near the gateway and in the vicinity of the wire, as well as the street in front of the premises as a playground." The Court reiterated what it had said in a previous case,[6] that a corporation which uses electricity of high voltage for lighting purposes is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires and liable to come accidentally or otherwise in contact with them.

In jurisdictions other than Pennsylvania, under facts showing that the plaintiff was a trespasser as against a third person on whose premises the defendant's wires were stretched, and where injury resulted to the plaintiff as a result of the defective condition of such wires, the decisions are in conflict. In a comparatively recent case,[7] decided in 1907, whose facts were very similar to those before the Superior Court in the case under discussion, it was said: "The immemorial habit of small boys to climb little oak trees filled with abundant branches reaching almost to the ground is a habit which corporations stretching their wires over such trees must take notice of. This Court, so far as the exertion of its power in a legitimate way is concerned, intends to exert that power so as to secure, at the hands of these public utility corporations handling and controlling these extraordinarily dangerous agencies, the very highest degree of skill and care."

The contrary view is expressed in a case decided in the Supreme Court of Michigan.[8] Said the Court: "The plaintiff has conclusively shown a condition and relation of things which as to himself and the public generally was safe and harmless if not interfered with, has shown neither invitation nor inducement warranting or excusing interference, and has just as conclusively proven an interference, participated in by himself, the character and results of which were not to be

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[6] *Fitzgerald* v. *Edison Electric Co.*, 200 Pa. 540.

[7] *Temple* v. *McComb City Electric Light & Power Co.*, 89 Miss. 1.

[8] *Stork* v. *Muskegon Traction & Lighting Co.*, 141 Mich. 575.

reasonably apprehended or guarded against. Whether or not, under the circumstances of this case, we apply the term 'trespasser' to one of the plaintiff's years, he was certainly a wrongdoer, who, but for his acts of wrongdoing, would not have been injured."

Although the view taken in the case of *Temple* v. *Electric Light Co.* (*supra*) seems to throw a very heavy burden on corporations dealing in electricity, yet, it is submitted, it seems sound. The ultimate question raised is whether to place upon parents of young children the duty of keeping them indoors, or of allowing them to play outdoors after first thoroughly grounding them in the law of technical trespass and its consequences, and endeavoring to stifle their natural instincts to climb trees and wander on unenclosed premises, or to place upon the public utility corporation handling such a dangerous thing as electricity the duty of anticipating that children may meddle with the wires carrying it where such wires are within their reach. If we look upon the law as a system of rules for human conduct in the ordinary affairs of life, it would seem that in formulating that system account must be taken of the fact that the same degree of care cannot be expected from children who are quite young as from those who are more mature in years, or from adults. This is apparently the view of the courts of last resort in Pennsylvania in dealing with public utility corporations handling electricity respecting the liability of the latter to children injured by coming in contact with defectively insulated wires, and it is submitted that it seems to be economically and legally sound.

ATTORNEY'S LIEN AND RIGHT OF ACTION FOR COMPENSATION.

In the recent English case of *In re Road Rapid Transit Co.*,[1] the rule concerning a solicitor's lien on documents was fully stated. One Neely acted as solicitor of a company and was also retained by the liquidator thereof, who subsequently discharged him and appointed another, to whom the liquidator required that Neely hand over the documents relating to the action, which had come into Neely's hands before and after the order for winding up the company. The Court held that the solicitor had acquired a valid lien on documents that came to his hands before the winding up order, which could not be defeated by

[1] L. R. 1909, 1 Ch. Div. 96.